

86 - 1066 (1)

Supreme Court, U.S.  
FILED

IN THE SUPREME COURT NOV 28 1986

OF THE UNITED STATES JOSEPH F. SPANIOL, JR.  
CLERK

OCTOBER TERM, 1986

NO. \_\_\_\_\_

DALTON BLACK GIBSON, PETITIONER

v.

MOBIL PRODUCING TEXAS & NEW MEXICO, INC.

AND

MOBIL OIL CORPORATION

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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2342

QUESTION PRESENTED

Whether it is for the  
Court or the Jury to weigh the  
credibility of the testimony  
of witnesses?

IN THE SUPREME COURT  
OF THE UNITED STATES  
October Term, 1986  
No. \_\_\_\_\_

Dalton Black Gibson, Petitioner

v.

Mobil Producing Texas & New Mexico, Inc.

and

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ON WRIT OF CERTIORARI TO THE  
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PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and  
Associate Justices of the Supreme Court of  
the United States:

Dalton Black Gibson, the  
petitioner herein, prays that a writ of  
certiorari issue to review the judgment of



the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on August 8, 1986.

#### QUESTION PRESENTED

Whether it is for the Court or the Jury to weigh the credibility of the testimony of witnesses?

#### PARTIES

During the pendency of this matter, plaintiff Dalton Black Gibson expired. Dalton Black Gibson is succeeded in interest by his widow, Exie Marie Gibson, Executrix of his estate. A timely Suggestion Of Death On The Record was filed in the trial court on July 5, 1985. Plaintiff's Unopposed Motion To Substitute was filed in the trial court on August 5, 1985. This matter was tried in the U. S.



District Court and appealed to the Fifth  
Circuit with the present caption. All  
other parties are shown in the caption.





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## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is unreported and is printed in the Appendix, page A-4. The judgment of the United States District Court for the Southern District of Texas, Houston Division, Honorable Ross N. Sterling presiding, is printed in the Appendix, page A-2. The Trial Court expressly declined to support its ruling with findings of fact and conclusions of law.

## JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit (Appendix, page A-4) was entered on August 8, 1986. A timely petition for rehearing was denied on September 5, 1986 (Appendix, page A-6). The jurisdiction of the





Supreme Court is invoked under Title 28,  
United States Code, Section 1254(1).

CONSTITUTIONAL PROVISIONS  
AND STATUTES INVOLVED

"Trial by jury in civil cases. In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Amendment 7 to the Constitution of the  
United States

"In an action brought under paragraph (1) [of the ADEA], a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a



violation of this Act . . ." 29 U.S.C.,  
§626(c)(2)

#### STATEMENT OF THE CASE

This is an age discrimination case brought under the ADEA. Gibson alleged that after he was laid off by a Mobil subsidiary, Mobil refused to hire him for a job opening because of his age. It is undisputed that Gibson was protected by the ADEA, that he applied for the job opening, that he possessed the required qualifications for the job opening as posted by Mobil, and that he was rejected.

The job opening was for a position in John Hankammer's department. According to Mobil's procedure, Hankammer was permitted to recommend a candidate for the job, with ultimate authority to hire being vested in Hankammer's superior.

(Subsequent to these events, an individual



recommended by Hankammer was hired.)

Gibson telephoned Hankammer to apply for the job opening. After his telephone conversation with Gibson, Hankammer discussed Gibson's application with Remick. At trial, Remick appeared in Court and testified that during that discussion, Hankammer said that he didn't want Gibson for the job because of Gibson's age. According to Remick, Hankammer stated that old people were like teats on a bull (a barnyard colloquialism meaning "useless") and that he didn't want any more old people in the office; and that he felt old people were like babies, and that he was nothing more than a babysitter.

After the parties rested, Mobil moved for a directed verdict, arguing that Remick's testimony was not credible. The motion was granted and subsequently affirmed by the Fifth Circuit.



## REASON FOR GRANTING WRIT

The ultimate issue in an age discrimination case is whether age discrimination has adversely affected a protected individual in his employment. See U. S. Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 75 L.Ed.2d 403, 103 S.Ct. 1478 (1983). Remick's testimony was direct evidence of Hankammer's state of mind at the time Gibson's application was rejected. See also TWA v. Thurston, 469 U.S. \_\_\_\_, 83 L.Ed.2d 523, 105 S.Ct. 613 (1985), (direct evidence in a discrimination case).

Clearly, according to Remick, Hankammer's state of mind was to intentionally discriminate against Gibson because of Gibson's age. Were the trier of fact to have fully credited Remick's testimony, the verdict would have





been in Gibson's favor, necessarily. That is, had the jurors decided that Remick's testimony was totally truthful, the jurors, on their oaths, would have had no choice but to find for Gibson.

The only plausible explanation of the Trial Court's granting of the directed verdict is that the Trial Court heeded Mobil's argument and weighed the credibility of Remick's testimony. In affirming, the Fifth Circuit has apparently overlooked the simplicity of the issue in this case. (Appeal was made difficult by the lack of findings of fact and conclusions of law.)

The Supreme Court held in Brady v. Southern Railroad, 320 U.S. 476, 88 L.Ed. 239, 64 S.Ct. 232 (1943) that it is within the exclusive province of the jury to weigh and judge the credibility of witnesses' testimony presented in Court. In granting a directed verdict in this



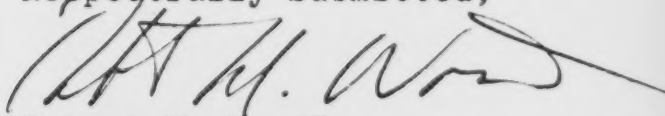
case, the Trial Court invaded the province of the Jury.

The right to a trial by jury is a cornerstone of our democracy.

### CONCLUSION

For the foregoing reason this petition for a writ of certiorari should be granted.

Respectfully Submitted,



Robert M. Wood\*  
Counsel for Petitioner  
1310 Trailwood  
Kingwood, Texas  
Phone (713) 358-5261

Dated: November 24, 1986

\*Robert M. Wood is qualified for membership in the Bar of the Supreme Court. Although not presently a member, Wood is now in the process of applying for membership, and his admission fee accompanies this Petition at the time of its filing.



## APPENDIX OF OPINIONS BELOW

The Trial Court declined to indicate its findings of fact and conclusions of law except to the extent its Order of September 10, 1985 could be considered to be such. See A-2

The Court Of Appeals for the Fifth Circuit declined to publish an Opinion explaining the factual and legal basis for its Affirmation of the Trial Court except to the extent its Opinion of August 8, 1986 could be considered to be such.

See A-4

The Court Of Appeals for the Fifth Circuit Order denying Rehearing is also included. See A-6



DALTON BLACK GIBSON,  
Plaintiff,  
v.  
MOBIL PRODUCING TEXAS  
& NEW MEXICO, INC.,  
Defendant,

H-84-1726

The above-captioned case having come on for trial and the Court having heard the testimony and reviewed the evidence of all of the parties and having concluded, pursuant to Rule 50 of the Federal Rules of Civil Procedure that, as a matter of law, plaintiff should take nothing in this action, it is hereby

A-2





SIGNED the 10th day of September,  
1985

/s/ROSS N. STERLING

U. S. District Judge



IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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NO. 85-2644

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DALTON BLACK GIBSON,

Plaintiff-Appellant,

versus

MOBIL PRODUCING TEXAS AND NEW MEXICO,  
INC., and MOBIL OIL CORPORATION,

Defendants-Appellees.

- - - - -  
Appeal from the  
United States District Court  
for the Southern District of Texas  
- - - - -

(August 8, 1986)

Before REAVELY and POLITZ, Circuit Judges,  
and ROBINSON, District Judge.\*

PER CURIAM:\*\*

This appeal is presented on the  
record developed before the district court  
during a four-day jury trial, and on the  
briefs and oral arguments of counsel.  
Considering same, and although this court  
would much prefer the district court



ruling in instances such as here presented in a judgment non obstante verdicto setting, thereby obviating the possibility of the need for a new trial were we to reverse, in this case we perceive no reversible error and AFFIRM.

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\*Honorable Mary Lou Robinson, U. S. District Judge, sitting by designation.

\*\*Local Rule 47.6 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this case shall not be published.



IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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NO. 85-2644

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DALTON BLACK GIBSON,

Plaintiff-Appellant,

versus

MOBIL PRODUCING TEXAS AND NEW MEXICO,  
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Defendants-Appellees.

- - - - -  
Appeal from the  
United States District Court  
for the Southern District of Texas  
- - - - -

ON PETITION FOR REHEARING AND  
SUGGESTION FOR REHEARING EN BANC

Opinion 8-8-86

September 5, 1986

Before REAVELY and POLITZ, Circuit Judges,  
and ROBINSON, District Judge.\*

PER CURIAM:

The Petition for Rehearing is  
DENIED and no member of this panel nor  
Judge in regular active service on the





Court having requested that the Court be  
polled on rehearing en banc, (Federal  
Rules of Appellate Procedure and Local  
Rule 35) the Suggestion for Rehearing En  
Banc is DENIED.

ENTERED FOR THE COURT:

/s/HENRY A. POLITZ  
U. S. District Judge

REHG-6

\* Honorable Mary Lou Robinson, U. S.  
District Judge, sitting by designation.